Supreme Court of the United States

OCTOBER TERM, 1924

No. 308

MODERN WOODMEN OF AMERICA.....Petitioner

vs.

JENNIE VIDA MIXER .....Appellee

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

BRIEF OF APPELLEE

J. J. McCARTHY,
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STATEMENT

Petitioner on Page 12 of its brief, under the heading "Abridgement of specifications of errors" set out the one objection that is raised in this case and the only one. The question is, "Did the Supreme Court of Nebraska, in affirming the trial court in this case, deny full faith and credit to the public acts of Illinois and the judgment entered in the case of Steen vs. Modern Woodmen of America, 296 Ill., 104, which case held that the petitioner had the power under its acts and the public acts of Illinois to enact the by-law in question?", (Rec., p. 17). That by the Supreme Court of Nebraska not following the interpretation placed upon said by-

law by the Illinois Court, did it violate Section 1, Article IV of the Constitution of the United States.

The appellee raises one objection to the procedure. We contend that the petitioner should have asked for a review of this case in this court by a writ of error instead of by a writ of certiorari, and we quote here the last paragraph of Judicial Code 237, as amended by act of Feb. 17, 1922 (42 Stat. 366):

> "In any suit involving the validity of a contract wherein it is claimed that a change in the rule of law or construction of statutes by the highest court of a state applicable to such contract would be repugnant to the Constitution of the United States, the Supreme Court shall, **upon writ of error,** re-examine, reverse, or affirm the final judgment of the highest court of a state in which a decision in the suit could be had, if said claim is made in said court at any time before said final judgment is entered and if the decision is against the claim so made."

ARGUMENT

I

THIS CASE SHOULD HAVE BEEN BROUGHT TO THIS COURT BY A WRIT OF ERROR INSTEAD OF A WRIT OF CERTIORARI.

Appellee will take up the second assignment of error first. Under the statute above quoted it seems clear that where the validity of a contract is involved, wherein it is claimed that a change in the ruling of law or construction of a statute by the highest court of the state applicable to such contract would be repugnant to the constitution of the United States this court shall re-examine such question upon a writ of error only. This case involves the insurance policy of Walter Crocker Mixer and involves the construction of the contract.

This case not being brought to this court by writ of error should be dismissed.

II.

THE CONTRACT SUED UPON WAS DELIVERED AND FIRST BECAME EFFECTIVE IN THE STATE OF SOUTH DAKOTA. THERE IS NEITHER PLEADING OR PROOF AS TO THE LAWS OF THAT STATE. THE LAW OF SOUTH DAKOTA IS THEREFORE PRESUMED TO BE THE SAME AS THE LAW OF NEBRASKA. THIS IS TRUE AS TO BOTH STATUTORY AND COMMON LAW.

The record contains repeatedly evidence without contradiction, and counsel for the petitioner, while not admitting it in the brief in this court admitted in the brief in the Supreme Court of Nebraska that the contract between the petitioner and Walter Crocker Mixer was delivered and first became effective in the state of South Dakota, and that the law of South Dakota is presumed to be the same as the law of Nebraska.

There is in the pleadings and the evidence no reference to the law of South Dakota upon any of the questions involved in this case, and for the purposes of this case it must therefore be conclusively presumed that the law of South Dakota is the same as the law of Nebraska, both as to statutory and common law.

Stark v. Olsen, 44 Neb., 646.
Council Bluffs v. Griswold, 50 Neb., 753.
Bannard v. Duncan, 79 Neb., 189; 112 N. W., 353.
Haggin v. Haggin, 35 Neb., 375.
Scroggin v. McClelland, 37 Neb., 644.
Chapman v. Brewer, 43 Neb., 890.
Smith v. Mason, 44 Neb., 610.

The presumption must therefore be indulged that the by-law relied upon by the appellant is under the law of South

Dakota unreasonable, void and of no effect, because of the fact that that is the conclusion reached by the court of this state, and as this case is presented to this court, the law of South Dakota is presumed to be the same as the law of Nebraska.

Mixer v. M. W. A., 197 N. W., 129 (This case).
Garrison v. M. W. A., 105 N. W., 25; 178 N. W., 842.

III

THE CONTRACT IN SUIT SHOULD BE CONSTRUED AND ENFORCED ACCORDING TO THE LAW OF THE PLACE WHERE MADE.

On Page 16 of the record in the answer of petitioner they allege in quoting from the application of Walter Crocker Mixer as follows:

> "This benefit certificate is issued and accepted only upon the following express warranties, conditions, and agreements: 1. That the Modern Woodmen of America is a Fraternal Beneficiary Society, incorporated, organized, and doing business under the laws of the state of Illinois, *and legally transacting such business in the state where said member resides.*"

The application contains such statements and recitals as these:

> "Neighbor Walter Crocker Mixer, a member of Forrest Camp No. 1957 of the Modern Woodmen of America, located at Elk Point, County of Union, State of South Dakota, is, etc." (Rec. P. 2).

Endorsed on the certificate is the following (Rec. P. 5)

> "Member adopted and certificate delivered this 20th day of November, 1901."

This is signed by the officers of Forrest Camp No. 1957, Modern Woodmen of America, at Elk Point, South Dakota, and immediately following such statement and signatures is the statement:

> "I hereby accept the above benefit certificate and agree to all the conditions therein contained.
> (Signed) W. C. Mixer." (Rec. p. 5).

The record shows therefore that the insured made application to the local camp at Elk Point, South Dakota, to become a member thereof, and provided in his application that no right should accrue to him, until he had been adopted and made the payments required at adoption, and that the certificate should only be delivered to him after adoption, all in accordance with the by-laws of the society, and the endorsement upon the certificate shows that this is what was done, and at the same time that he was adopted into the local camp the certificate was delivered to him and he accepted it, paid the dues and charges required. So that all of the acts which made the certificate a contract took place at Elk Point, South Dakota, and not in the state of Illinois, the appellant acting by and through its local Camp and the officers thereof as its agents, and the insured acting for himself. It is therefore quite immaterial that the Constitution of the United States provides that full faith and credit must be given to certain records and acts of each state when they become important in some other state. The situation presented by this record compels the presumption that the law of South Dakota is the same as the law of Nebraska, and hence the trial court was right in sustaining the demurrer to what is called in this record the "first affirmative ground of defense" of the defendant (Division I, Rec. p. 12).

The general rule that the construction of a contract of insurance and the rights and obligations of the parties thereto must be determined by the law of the place where the contract is made, is supported by a number of recent cases.

Equitable Life Assurance Society vs. Pettus, 140 U. S. 228; 35 L. Ed. 497.

Mutual Life Ins. Co. vs. Cohen 179 U. S. 263; 44 L. Ed. 181.

Supreme Council vs. Meyer 198 U. S. 508; 49 L. Ed. 1146.

Life Ins. Co. vs. McCue, 223 U. S. 234, 38 L. R. A. (N. S.) 57.

Ingersol vs. Ins. Co., 156 Ill. App. 568.

Wilde vs. Wilde, 95 N. E. 295 (Mass.)

Green vs. Supreme Council, 124 N. Y. S. 398.

Head vs. Ins. Co., 147 S. W. 827 (Mo.).

In Northwest Mutual Life Ins. Co. vs. McCue et al., 223 U. S. 234, 38 L. R. A. (N. S.) 57, there was considered a contract issued by the insurance company, a Wisconsin corporation, to the insured, a resident of Virginia, and the question as to the law of which state should govern was important because of certain decisions of the courts of the state of Illinois, construing like contracts of the insurance company. The court, speaking by Mr. Justice McKenna, said:

"The obligation of the contract undoubtedly depends on the law under which it is made. In which state then, Virginia or Wisconsin, was the policy made? In Equitable etc. vs. Clements, 140 U. S. 226 the question arose whether the contract of insurance was made in New York or Missouri. The insured was a resident of Missouri and the application for the policy was signed in Missouri. The policy executed at the office of the company provided that the contract between the parties was completely set forth in the policy, and the application therefore taken together. The application declared that the contract should not take effect until the first premium should have been actually paid — Two annual premiums were paid in Missouri and the policy, at the request of the assured was transmitted to him in Mi-

souri, and there delivered to him. The court said: 'Upon this record the conclusion is inevitable that the policy never became a completed contract binding either party to it until the delivery of the policy, and the payment of the first premium in Missouri, and consequently that the policy is a Missouri contract governed by the laws of Missouri.'

"In Mutual Life Ins. Co. vs. Cohen, 179 U. S. 262, the insurance policy contained a stipulation that it should not be binding until the first premium had been paid, and the policy delivered. The premium was paid and the policy delivered in Montana. It was held that 'under these circumstances, under the general rule the contract was a Montana contract and governed by the laws of that state.'

"The same conditions existed in Mutual Life Ins. Co. vs. Hill, 193 U. S. 551. It was decided, the two cases above mentioned being cited, that the policy of insurance was a Washington contract and not a New York contract.

"In the case at bar, the application was made by McCue at Charlottsville, Virginia—the policy was delivered to him there. It is provided in the policy that it should not take effect until the first premium should be actually paid. Following the provision is this: "In witness whereof the Northwest Mutual Life Ins. Co. at its office in Milwaukee, Wisconsin, has by its president and secretary signed and delivered this contract this 15th day of March, 1904.' But manifestly this was not intended to affect the preceding provision fixing the time when the policy should go into effect, nor the legal consequences which followed it. In Equitable, etc., v. Clements, supra, the policy was executed at the company's office in New York. The exact conditions therefore existed which made, in the cases cited, the policies

involved therein not New York contracts but respectively Missouri, Montana, and Washington contracts. The policy therefore in the case at bar must be held to be a Virginia, and not a Wisconsin, contract."

The court therefore held that the contract was a Virginia contract, and the "obligation of a contract undoubtedly depends upon the law under which it is made."

In the case of Supreme Council v. Mayer, 198 U. S., 508 49 L. Ed. 1146, this court held:

> "All matters respecting the remedy and admissibility of evidence depend upon the law of the state where the suit is brought."

The rule of law in Nebraska is that seven years of unexplained absence is presumption of death, and this petitioner attempted by a private contract in the way of a bylaw, to change the law of Nebraska. Nebraska courts have held this by-law unreasonable. If Nebraska will be compelled to follow the Illinois decision, then all foreign corporations will have an advantage over domestic corporations. Nebraska corporations will be bound by the seven-year ruling while all foreign insurance corporations will be bound by a more liberal rule. If the foreign corporations are permitted to do this they can practically contract out all the laws of Nebraska.

The answer admits the facts showing the delivery and consummation of the contract sued upon at Elk Point, South Dakota (Rec. p. 11-12). The allegations of division one of the answer do not constitute a defense to the cause of action alleged by the appellee. This part of the answer presented no federal question, and the court properly so held (Rec. p 35). The fact that the court of Illinois has construed the by-law in question to be reasonable and enforcible is not as the authorities hereinbefore referred to clearly show, important in the situation presented by this record. No other point is con-

tended for in the brief of the petitioner. As to the facts of the disappearance, there is no dispute. The evidence in this case brings it clearly within the rule that seven years of continuous unexplained absence of a person without tidings to his relatives or persons who would likely hear from him, creates a presumption of death.

Respectfully submitted,

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